Nos. 07-1428, 08-328

In the Supreme Court of the United States

FRANK RICCI, ET AL., *Petitioners*
v.
JOHN DESTEFANO, ET AL., *Respondents*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR
THE NEW YORK LAW SCHOOL
RACIAL JUSTICE PROJECT
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION 2

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. The Court Has Never Held That Race-Neutral State Policies That Are Adopted for the Purpose of Alleviating Structural Racial Inequality Are Subject to Strict Scrutiny, Much Less That Such Policies Are Unconstitutional. 4

A. Petitioners Distort the Court's Equal Protection Jurisprudence to the Extent They Conflate Governmental Action That Systematically Advantages Racial Minorities with General Race-Conscious Policymaking. 6

B. Petitioners' Overly Restrictive Interpretation of Equal Protection Doctrine Could Threaten a Wide Range of Measures That Are Facially Race-Neutral in Their Application. 12

TABLE OF CONTENTS—Continued

II. The Court Should Not Reformulate Equal Protection Law in a Manner That Impedes the Efforts of Public Employers to Take Voluntary, Race-Neutral Steps to Comply with Title VII.... 15

A. It Would Be Premature to Apply Strict Scrutiny Now, Given That the City Is in the Middle of Its Selection Process and Was Still Exploring Its Options Following the Civil Service Board's Non-Certification of the Test Results When Petitioners Filed Suit. 17

B. The Inflexible Interpretation of Equal Protection Doctrine Advanced by Petitioners Would Hamper the Efforts of Public Employers to Comply with Title VII, Thereby Undermining the "Legitimate Interest Government Has in Ensuring [That] All People Have Equal Opportunity Regardless of Their Race." 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases

Adarand v. Pena,
515 U.S. 200 (1995) 5, 6, 8, 11

Am. Civil Rights Found. v. Berkeley Unified Sch. Dist.,
2009 WL 678992 (Cal. Ct. App. 1 Dist.) 13

Bartlett v. Strickland,
07-689, 2009 WL 578634 (U.S. Mar. 9, 2009).... 4, 9

Brown v. Bd. of Educ.,
347 U.S. 483 (1954) 5

Bush v. Vera, 517 U.S. 952 (1996) 3, 9, 10

City of Richmond v. Croson,
488 U.S. 469 (1989)..... *passim*

Easley v. Cromartie,
532 U.S. 234 (2001) 10

Edmonson v. Leesville Concrete Co.,
500 U.S. 614 (1991) 5

Faragher v. City of Boca Raton,
524 U.S. 775 (1998)..... 21

TABLE OF AUTHORITIES—Continued

Page(s)

Gratz v. Bollinger,
539 U.S. 244 (2003) 5, 8

Grutter v. Bollinger,
539 U.S. 306 (2003) 5, 8, 13

Heckler v. Mathews,
465 U.S. 728 (1984) 16

Hunt v. Cromartie,
526 U.S. 548 (1999) 7

Johnson v. Bd. of Regents of the Univ. of Ga.,
263 F.3d 1234 (11th Cir. 2001) 14

Johnson v. California,
543 U.S. 499 (2005) 5, 8

Johnson v. Transp. Agency,
480 U.S. 616 (1987) 16

Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland,
478 U.S. 501 (1986) 21

Miller-El v. Dretke,
545 U.S. 231 (2005) 5

TABLE OF AUTHORITIES—Continued

Page(s)

Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 127 S. Ct. 2738 (2007) ..... *passim*

Pers. Adm'r v. Feeney, 442 U.S. 256 (1979) 8

Planned Parenthood v. Casey, 505 U.S. 833 (1992) 15

Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) 12

Ricci v. DeStefano, 530 F.3d 88 (2d Cir. 2008) 12

Rice v. Cayetano, 528 U.S. 495 (2000) 5

Shaw v. Reno, 509 U.S. 602 (1993) 5, 8

Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999) 14

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) 7, 8

TABLE OF AUTHORITIES—Continued

Page(s)

Washington v. Davis,
426 U.S. 229 (1976) 8

Wygant v. Jackson Bd. of Educ.,
476 U.S. 267 (1986) 5

Statutes

Federal

20 U.S.C. § 1681(a) 16

20 U.S.C. § 6311(b)(2)(C)(v) 16

29 U.S.C. § 206(d) 16

42 U.S.C. § 1973(a) 15

42 U.S.C. § 2000e-2(a)(2) 2, 20

42 U.S.C. § 2000e-2(h) 16

42 U.S.C. § 2000e-2(k)(1)(A)(i) 20

42 U.S.C. § 3601 *et seq.* 15

TABLE OF AUTHORITIES—Continued

Page(s)

State

TEX. EDUC. CODE ANN. § 51.803(a) 13

Regulations

34 C.F.R. § 100.3(b)(6)(ii) 16

Other Authorities

88 CONG. REC. 14,219 (1964) 20

Andrew M. Carlon, *Racial Adjudication*, 2007 BYU L. REV. 1151 (2007) 4, 8

The Civil Rights Act of 1990: J. Hearings on H.R. 4000 Before the Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the H. Comm. of the Judiciary, 101st Cong., 1st Sess. (1990) (statement of Rep. Edwards), *reprinted in* 4 BERNARD D. REAMS JR. & FAYE COUTURE, THE CIVIL RIGHTS ACT OF 1991: A LEGISLATIVE HISTORY OF PUBLIC LAW 102-166, at 19 (1994) 20

TABLE OF AUTHORITIES—Continued

Page(s)

The Civil Rights Act of 1990: J Hearings on H.R. 4000 Before the Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary, 101st Cong., 1st Sess. (1990) (statement of Rep. Gunderson), *reprinted in* 5 BERNARD D. REAMS JR. & FAYE COUTURE, THE CIVIL RIGHTS ACT OF 1991: A LEGISLATIVE HISTORY OF PUBLIC LAW 102-166, at 181 (1994) 20

Fla. Exec. Order No. 99-281 13

THE REGENTS OF THE UNIV. OF CAL., POLICY ON UNDERGRADUATE ADMISSIONS REQUIREMENTS (2009) 13

INTEREST OF *AMICUS CURIAE*[1]

The New York Law School Racial Justice Project ("the Racial Justice Project") is a legal advocacy organization sponsored by New York Law School that is dedicated to protecting constitutional and civil rights. The Racial Justice Project seeks to increase public awareness of racism, racial injustice, and structural racial inequality in the areas of education, employment, political participation, and criminal justice. To accomplish its mission, the Racial Justice Project engages in litigation, training, and public education and other forms of advocacy that seek to ensure equal access and opportunity. The Racial Justice Project has a continued interest in the development of jurisprudence that guards against racial discrimination and that promotes a positive legal framework for addressing matters of civil and constitutional rights. Accordingly, the Racial Justice Project has a substantial interest in the outcome of this litigation.

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[1] The parties have filed blanket written consents to the filing of *amicus* briefs in this case. This brief was not authored in whole or in part by a party or counsel for a party, and no person or entity, other than *amicus curiae*, its members, and its counsel, made a monetary contribution to the preparation and submission of this brief.

INTRODUCTION

The overly rigid interpretation of Equal Protection doctrine advanced by Petitioners runs counter to the letter, spirit, and logic of the Court's well-established law in this area. Petitioners go too far to the extent they invite the Court to apply strict scrutiny to state policies that may be race-conscious in their objective, but are clearly race-neutral in their application. A ruling to such effect by the Court not only has the potential to seriously erode Title VII's promise of eliminating structural barriers to employment opportunity for racial minorities, but also would cast doubt on an array of governmental policies and programs that are similarly structured around the goals of promoting a more racially inclusive society.

SUMMARY OF THE ARGUMENT

At issue in this case are the reasonable efforts of a local government to constitutionally navigate Title VII's laudable goal of eliminating racial segregation in the workforce, 42 U.S.C. § 2000e-2(a)(2), the faithful implementation of which necessarily requires some background consideration of race. In carrying out this goal, the City of New Haven [hereinafter "the City"] declined to certify a test used to assess firefighters for promotion based on its reasonable belief that such test was invalid

under Title VII's disparate impact standard.[2] Nothing in the Supreme Court's Equal Protection jurisprudence commands the application of strict scrutiny to a state actor's race-conscious decision to disband use of a governmental process that reasonably appears to violate federal law. *Cf. Bush v. Vera*, 517 U.S. 952, 958 (1996) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race."). Nor is strict scrutiny an appropriate standard of review given that the City was in the middle of its selection process, having just returned to the drawing board to determine how best to proceed following the Civil Service Board's split vote and non-certification of the test results.

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[2] After becoming aware of a stark racial disparity in the results of its 2003 firefighter promotion examination, the City referred the issue of the promotions and use of the test to the Civil Service Board [hereinafter "the Board"], an independent body charged with administering the City's civil service system, including the certification of the results of competitive examinations. J.A. 221–22. It is the Board, and not City officials, that make all final decisions regarding the use of the examination results. Respondent's Brief on the Merits 6 [hereinafter Resp't Br.]. Over a two-month period, the Board held five hearings at which members of the public, testing experts, and Thomas Ude, Corporation Counsel for the City, testified. Following the hearings, the Board split two to two; and the test results were not certified. Resp't Br. 10.

ARGUMENT[3]

I. The Court Has Never Held That Race-Neutral State Policies That Are Adopted for the Purpose of Alleviating Structural Racial Inequality Are Subject to Strict Scrutiny, Much Less That Such Policies Are Unconstitutional.[4]

The Court has consistently emphasized that its primary Equal Protection concern in the race context lies with state policies that explicitly and systematically classify individuals on the basis of race as part of an "adjudicatory"[5] process for determining the distribution of governmental services or benefits; as a "predominant factor" in

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[3] The order of arguments in the Petitioners' Brief implies that the Court should consider the constitutionality of the City's actions first, before addressing the matter under Title VII. *See* Petitioners' Brief. i (Questions Presented) [hereinafter Pet'rs Br.]. If so, Petitioners advance a novel theory that infringes the well-established "canon of constitutional avoidance." *See Bartlett v. Strickland*, 07-689, 2009 WL 578634, at *2 (U.S. Mar. 9, 2009). The appropriate course is for the Court first to analyze the City's actions under Title VII and then, only if it concludes that there is no Title VII violation, to proceed to the Petitioners' constitutional argument.

[4] Amicus incorporates by reference all of Respondents' arguments, and merely writes separately to emphasize that strict scrutiny is not an appropriate standard of review either in this case or in any other cases that might address the constitutionality of government policies that espouse race-conscious objectives, but are race-neutral in their application.

[5] *See* Andrew M. Carlon, *Racial Adjudication*, 2007 BYU L. REV. 1151, 1183 (2007).

electoral districting; expressly to segregate on account of race; or for the invidious purpose of burdening individuals due to racial animus, prejudice, or hostility. *See, e.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 127 S. Ct. 2738 (2007) (K–12 school assignment); *Miller-El v. Dretke*, 545 U.S. 231 (2005) (race-based peremptory strikes in criminal jury selection); *Johnson v. California*, 543 U.S. 499 (2005) (policy of segregating prisoners on basis of race); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (law school admissions); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (undergraduate admissions); *Rice v. Cayetano*, 528 U.S. 495 (2000) (voting privileges for state office); *Adarand v. Pena*, 515 U.S. 200 (1995) (federally-funded contracts); *Shaw v. Reno*, 509 U.S. 630 (1993) (congressional redistricting); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630–31 (1991) (race-based peremptory strikes in civil trial may rest on racial stereotypes, "open hostility or from some hidden and unarticulated fear"); *City of Richmond v. Croson*, 488 U.S. 469 (1989) (locally-funded contracts); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (collective bargaining agreement that extended "preferential protection" to minorities against layoffs); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (race-based school assignment to perpetuate racial segregation).

Petitioners go too far, therefore, to the extent they invite the Court to apply strict scrutiny to *any* governmental action that relies at some aggregate level on race-conscious policy. Carried to its logical conclusion, this overly restrictive and inflexible treatment of race would unnecessarily discourage

state actors from taking voluntary, facially neutral steps to address structural racial inequality in employment—an outcome neither required by Equal Protection doctrine nor supported by its logic. *Cf. Parents Involved*, 551 U.S. at ___, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment) (rejecting plurality's rigid "colorblind" approach and concluding that schools are "free to devise race-conscious measures to address the problem [of racial isolation] in a general way" without fear of triggering strict scrutiny). Notwithstanding the admonition that strict scrutiny is not "fatal in fact," *Adarand*, 515 U.S. at 237 (plurality opinion), the application of such a standard would have the practical effect of casting doubt on an array of governmental programs and practices, including some that a solid majority of the Court has suggested would pass constitutional muster. *Parents Involved*, 551 U.S. at ___, 127 S. Ct at 2793 (Kennedy, J., concurring in part and concurring in the judgment); *Croson*, 488 U.S. at 521 (Scalia, J., concurring in the judgment); *see infra* Pt. I.B.

A. Petitioners Distort the Court's Equal Protection Jurisprudence to the Extent They Conflate Governmental Action That Systematically Advantages Racial Minorities with General Race-Conscious Policymaking.

Petitioners argue that the decision by the City not to certify the results of the 2003 promotion examination was "motivated by race, relying solely

on racial-distribution information about the candidates, and with a starkly disparate racial harm," and therefore should be subject to strict scrutiny under the Equal Protection Clause. *See* Pet'rs Br. 24. As the basis for their assertion, Petitioners attempt to cobble together a series of "race-based actions" purportedly taken by the City. *See* Pet'rs Br. 10, 26. These include the City's (acknowledged) consideration of the adverse racial impact of the test on minority candidates as a group, achieved by race-coding the results of the civil service exam; its subsequent non-certification of the test results to avoid liability under Title VII; and the supposed influence that Reverend Kimber, a local African-American minister, had during the City's deliberative process before the Civil Service Board. *See* Pet'rs Br. 11, 30.[6]

None of these actions in any way qualifies as a racial "classification" or "preference" for purposes of heightened constitutional review.[7] In so asserting,

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[6] Petitioners also assert that the City's expressed concern about liability under Title VII was in fact a conspiratorial cover for its efforts to engage in "racial politics" with Reverend Kimber. Pet'rs Br. 30–31. Putting to one side the accuracy of this claim and whether there is any genuine factual support for it in the record, nothing in Equal Protection doctrine remotely requires a state actor to disregard a politically active constituent merely because of his efforts on behalf of a racially identifiable community. *Cf. Hunt v. Cromartie*, 526 U.S. 548, 551 (1999) (observing that state reapportionment scheme that is drawn with an awareness of the alignment between political affiliation and race is still likely to pass constitutional muster).

[7] To the extent that Petitioners' argument rests on allegations of "disparate racial harm," the Court should utilize the standard of review established in *Vill. of Arlington Heights*

Petitioners conflate two distinctly different kinds of racially contextualized state action, which this Court's longstanding Equal Protection jurisprudence has suggested warrant different levels of scrutiny. The first, which clearly triggers close review under well-established and more recent case law, involves an explicit state policy or practice of systematically identifying individuals by race in the course of assigning or allocating a governmental benefit to some individual(s) within that group,[8] *see, e.g.*, *Grutter*, 539 U.S. 306; *Gratz*, 539 U.S. 244; *Adarand*, 515 U.S. 200; *Croson*, 488 U.S. 469, or in the course of performing some governmental function that plainly segregates individuals on the basis of race, *see Johnson*, 543 U.S. 499 (policy of racial segregation in prisons); *Shaw*, 509 U.S. 630 (redistricting where race is a "predominant factor"). Thus, the Court has determined that strict scrutiny applies to "benign" state classifications by race, *see, e.g.*, *Grutter*, 539 U.S. at 326; *Adarand*, 515 U.S. at 227, while notably concluding that such classifications may survive more rigorous judicial review. *Grutter*, 539 U.S. at 326; *cf. Adarand*, 515

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v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); *see also Washington v. Davis*, 426 U.S. 229 (1976). The City's argument is entirely consistent with the framework set forth by the Court in *Arlington Heights*. While the Court has been careful to observe that "ostensibly neutral" classifications are presumptively invalid where they are an "obvious pretext for racial discrimination," *Pers. Adm'r v. Feeney*, 442 U.S. 256, 272 (1979), *Arlington Heights* counsels that identifying a governmental "discriminatory purpose"—rather than the state's consideration of race *per se*—lies at the heart of the Court's Equal Protection analysis. *See* 429 U.S. at 264–65.

[8] *See* Carlon, *supra* note 5, at 1159–60.

U.S. at 237 (observing that "[s]trict scrutiny is not 'strict in theory, but fatal in fact'").

The second kind of state action—the type implicated by the City's efforts to avoid Title VII liability—involves general race-conscious policymaking that should not trigger strict scrutiny. For example, although Justice Kennedy in *Parents Involved* rejected blunt uses of race to assign students to different public schools, he plainly endorsed the overarching race-conscious goal of reducing racial isolation and/or promoting student body diversity in K–12 education, suggesting in the strongest possible terms that "general" policies used to carry out these goals would not invite strict scrutiny. *See Parents Involved*, 551 U.S. at ___, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment).[9] In the voting context, at least five current members of the Court have similarly endorsed the limited use of race for redistricting, in order to "ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions." *Bartlett*, 2009 WL 578634, at *16; *see also Parents Involved*, 551 U.S. at ___, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment) (quoting with approval *Vera*, 517 U.S. at 958 (plurality opinion) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. . . . Electoral district lines

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[9] Moreover, a fair reading of the dissenting opinions in *Parents Involved* strongly suggests that at least four other members of the Court would support Justice Kennedy's view. *See Parents Involved*, 551 U.S. at ___, 127 S. Ct. at 2800–37 (Breyer, J., dissenting).

are 'facially race neutral' so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of 'classifications based explicitly on race.'")); *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) (race may be "'*a* motivation for the drawing of a majority-minority district,'" provided it is not the "'*predominant* factor' motivating the legislature's districting decision") (quoting *Vera*, 517 U.S. at 959 (plurality opinion)). In this respect, the City's consideration of race to avoid adverse racial impact under Title VII—and its concomitant identification of promotion candidates by race for purposes of that analysis—is analogous to a state's race-conscious efforts to avoid liability under the Voting Rights Act. Both kinds of state action implicate race-conscious objectives, but at an aggregate level and in a manner that does not immediately burden or disadvantage particular individuals. Properly understood, these cases indicate that the Court does not reflexively apply strict scrutiny simply because race is somehow present in a governmental process.

Thus, while Petitioners allege that the proceedings before the Civil Service Board constitute the kind of "race-based action" that the Court has determined necessarily triggers strict scrutiny under the first category of state action, a fairer reading suggests that the Board's deliberations fall within the second category. The deliberations may to some extent have been race-conscious in that they sought to comply with Title VII, but they are distinctly race-

neutral in that they did not award or deny individual employment on the basis of race.[10]

For this reason, the Petitioners' reliance on *Adarand* and *Croson* is misplaced. *See* Pet'rs Br. 23–26. Unlike the facts of this case, both *Adarand* and *Croson* involved the constitutionality of programs that facially and systematically conferred a presumptive advantage on racial minorities. In *Adarand*, the Court concluded that strict scrutiny applied to a federal program that gave a presumptive preference to minority business entities. 515 U.S. at 206–07. The Court in *Croson* applied strict scrutiny to strike down a minority business enterprise program that required prime contractors on city projects to subcontract a fixed percentage of the contract amount explicitly on the basis of race. 488 U.S. at 477–78. The *Croson* program thus facially employed racial quotas and, like the program at issue in *Adarand*, actually awarded contracts to racially-identified "minority" businesses on the basis of such state classifications. Neither *Croson* nor *Adarand*, therefore, stands for the broad proposition advanced by Petitioners here—that a governmental actor's *general* consideration of race necessarily warrants heightened judicial review when it seeks to comply with a (perhaps arguably)

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[10] For reasons discussed below, *see infra* Pt. II.A, it would be premature to apply strict scrutiny at this stage of the City's selection process when it was still deliberating about how to appropriately respond to the promotion examination's disparate impact and concerns raised regarding the test's validity.

race-conscious federal mandate but does so using means that are not individually, racially targeted.[11]

B. Petitioners' Overly Restrictive Interpretation of Equal Protection Doctrine Could Threaten a Wide Range of Measures That Are Facially Race-Neutral in Their Application.

The application of strict scrutiny in the manner urged by Petitioners has the potential to jeopardize numerous measures employed by various state actors that are race-conscious in their objectives but are neutrally applied, including some measures that members of this Court have previously endorsed.

State and local governments have increasingly employed facially race-neutral measures to achieve greater minority inclusion and participation. For example, the Texas Legislature passed House Bill

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[11] Moreover, all candidates for the City's firefighter exam took the same test and were subject to the same scoring system and screening process. *Cf. Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 272–76 (1978) (using strict scrutiny to strike down a school admission program that used one process for minorities and another for all other applicants). Although Petitioners claim that they were denied promotions that they were otherwise "entitled" to under state law because of their race, their claim rests on the unfounded assumption that the test upon which they stake their entitlement was in fact a valid assessment tool. The district court correctly concluded that Petitioners had raised no triable factual issue that the City's concern about the test's validity was pretextual. *Ricci v. DeStefano*, 530 F.3d 88, 89 (2d Cir. 2008) (denial of petition for rehearing en banc)

588, the "Ten Percent Plan," partly in an effort to increase minority enrollment. *See* TEX. EDUC. CODE ANN. § 51.803(a) (Vernon 2007). Similarly, the University of California Board of Regents voted to guarantee the top four percent of students from every state high school admission into a state university. *See* THE REGENTS OF THE UNIV. OF CAL., POLICY ON UNDERGRADUATE ADMISSIONS REQUIREMENTS (2009). Florida has adopted a similar policy, The One Florida Equity in Contracting Initiative. *See* Fla. Exec. Order No. 99-281 (granting admission in the state university system to anyone graduating in the top 20% of their class in any of the state's high schools). Although the "percentage plans" are motivated at least in part by a desire to improve the station of racial minorities, the Court has implicitly endorsed the use of such measures as "race neutral." *See Grutter*, 539 U.S. at 339 (describing the percentage plans as a "race-neutral" alternative); *cf. Am. Civil Rights Found. v. Berkeley Unified Sch. Dist.*, 2009 WL 678992 (Cal. Ct. App. 1 Dist.) (finding that use of neighborhood demographics to carry out school assignment for purposes of creating racial and socioeconomic diversity does not violate the California Constitution provision barring "preferential treatment" on the basis of race).

Neither the letter nor spirit of Equal Protection doctrine suggests that any of the measures described above are unconstitutional. To the contrary, a solid Court majority has often encouraged the use of race-neutral means to achieve the justifiably race-conscious objectives of greater

minority inclusion and participation.[12] *Parents Involved*, 551 U.S. at ___, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment) ("School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means" including strategic selection of locations, drawing of attendance zones, special programs, and targeted recruiting with a recognition of demographics). Indeed, even members of the Court who in the past have explicitly rejected any use of race to confer or deny *individual* benefits have nevertheless acknowledged the continuing importance of overarching race-conscious measures to dismantle structural barriers to opportunity for racial minority groups. *See, e.g.*, *Croson*, 488 U.S. at 526 (Scalia, J., concurring in the judgment) ("A state can, of course, act to 'undo the effects of past discrimination' in many permissible ways that do not involve classification by race."). Lower courts have also sanctioned the consideration of race-neutral policies to promote goals that are explicitly race-conscious. *See, e.g.*, *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1259 (11th Cir. 2001) ("guaranteeing admission to the top percentage of graduating seniors in every high school in the state" may serve as an "innovative strateg[y]" to create a more diverse student body); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 706 (4th Cir. 1999) (noting that three "race-neutral alternatives demonstrate[d] that the school Board ha[d] race-

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[12] Accordingly, Petitioners' contention that the City must first establish a Title VII violation against itself prior to taking steps to avoid a racially disparate impact, *see* Pet'rs Br. 58, is simply wrong.

neutral means to promote diversity"). A contrary ruling by the Court that adopts Petitioners' aggressive doctrinal view, therefore, would destabilize settled social expectations about the appropriate means for policing the boundaries between individual rights and laudable state efforts that justifiably seek to promote racial inclusion. *Cf. Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992) (describing the importance of taking into account the country's social practices and reliance interests).

II. The Court Should Not Reformulate Equal Protection Law in a Manner That Impedes the Efforts of Public Employers to Take Voluntary, Race-Neutral Steps to Comply with Title VII.

While this Court has long held that Equal Protection analysis does not depend on the race of those benefited or burdened by a particular classification, *see, e.g.*, *Croson*, 488 U.S. at 494, none of this Court's prior Equal Protection cases mandates the application of strict scrutiny in this unique employment context, involving the defensive consideration of race at the policy level in order to avoid the specter of federal liability under Title VII.[13] The Court should reject Petitioners' call to

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[13] A broad decision by the Court to apply strict scrutiny here could jeopardize the ability of governmental entities to comply with analogous race-conscious federal statutes and regulations in other contexts. *See, e.g.*, Fair Housing Act, 42 U.S.C. § 3601 *et seq.* (2000) (prohibiting housing practices that produce racially disparate impact); *see also* Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973(a) (2000) (prohibiting practices

reformulate Equal Protection doctrine in a manner that would frustrate voluntary efforts by state actors to address persistent racial disparities in employment. Moreover, the application of strict scrutiny at this interim stage in the City's selection process—just as it was returning to the drawing board to determine what it should do—is not required to advance the goals of the Fourteenth Amendment and would be unnecessarily disruptive to the City's efforts to craft an appropriate resolution to this problem.[14]

"which result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color"); No Child Left Behind Act of 2001, 20 U.S.C. § 6311(b)(2)(C)(v) (2000) (requiring states to track the educational achievement of racial and ethnic groups); 34 C.F.R. § 100.3(b)(6)(ii) (2009) (authorizing program recipients of federal funding to take affirmative action to overcome racial inequalities, even in the absence of prior discrimination, pursuant to Title VI of the Civil Rights Act of 1964).

[14] Such a determination could also cast doubt on this Court's jurisprudence in the area of sex-based classifications. The Court has upheld sex-based classifications to remedy the "manifest imbalance" in the workforce. *See Johnson v. Transp. Agency*, 480 U.S. 616 (1987); *cf. Heckler v. Mathews*, 465 U.S. 728 (1984) (rejecting constitutional challenge to statute that offsets the pensions of husbands, but not wives). Petitioners' suggested construction of Equal Protection doctrine could, therefore, limit employers' ability to engage in sex-conscious actions to comply with federal anti-discrimination statutes, leaving them exposed to litigation. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) (2000) (prohibiting employment discrimination based on sex); Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2000) (prohibiting employers from paying male and female employees working on comparable jobs different wages solely based on an employee's sex); *see also* Title IX of the Civil Rights Act of 1964, 20 U.S.C. § 1681(a) (2000) ("No person in the United States shall, on the basis of

A. It Would Be Premature to Apply Strict Scrutiny Now, Given That the City Is in the Middle of Its Selection Process and Was Still Exploring Its Options Following the Civil Service Board's Non-Certification of the Test Results When Petitioners Filed Suit.

Petitioners' assertion that strict scrutiny applies to the City's decision to decline certification of the test—leading, in their view, to lost promotion opportunities—rests on the unwarranted assumption that the City had actually concluded the selection process.[15] In reality, the City was still sorting out its options when Petitioners filed this suit.[16] Petitioners, therefore, seek to bypass the City's process and instead seek through litigation to force a resolution in their immediate favor.[17] Strict scrutiny at this stage might be warranted were there a triable factual question of whether the City had proceeded in a reasonable, deliberative, and

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sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education [assistance] program or activity receiving Federal financial assistance . . ."). Thus, such a determination will also pit sex-based curative measures, essential to conformity with federal statutes, against the Equal Protection Clause, all the while frustrating the purpose of both.

[15] The other unwarranted assumption is that Petitioners were entitled as a matter of law to the promotions, which of course is one of the core questions being addressed in this case. *See* Pet'rs Br. i (Questions Presented).

[16] *See* Resp't Br. 1.

[17] The City also had to contend with the possibility that a decision to proceed with the certification would have invited a challenge to its test based on disparate impact, placing it in the sensitive position of having to navigate conflicting legal claims.

transparent fashion. *Cf. Parents Involved*, 551 U.S. at ___, 127 S. Ct at 2789–90 (Kennedy, J., concurring in part and concurring in the judgment) (objecting to lack of transparency in school assignment policy). But such is not the case here. The Civil Service Board's decision not to certify resulted from an extensive process involving five hearings over the course of two months, including public and expert testimony both from those who supported and opposed certification.[18] The City plainly was acting conscientiously in its efforts to reach a fair, just, and lawful result.

Thus, the application of strict scrutiny now would be premature. To find otherwise would trap governmental actors between the proverbial rock and a hard place, caught between a constitutional standard of heightened judicial review—never intended to apply in circumstances like these—and a federal law that is appropriately designed to eliminate segregation in the workplace. If public actors are to carry out this mandate, they must be provided some reasonable room to maneuver without fear that they will be hauled into court merely for considering the overarching impact of race before they have even finished their selection process.[19] Indeed, Justice Kennedy expressed this very concern in his concurrence in *Parents Involved*:

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[18] *See* Resp't Br. 1, 6 (describing evidence before the Civil Service Board concerning the test's lack of validity).

[19] This is not to suggest that the City could repeatedly rewrite its test or infinitely extend its selection process without inviting heightened judicial review. However, because these facts do not present themselves in this case, the Court need not address this question.

> Executive and legislative branches, which for generations now have considered [race-conscious] policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races.

551 U.S. at ___, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment). This concern applies with equal force here where the City, having begun the process of identifying its options, should be permitted reasonable time and space to bring it to a close.

B. The Inflexible Interpretation of Equal Protection Doctrine Advanced by Petitioners Would Hamper the Efforts of Public Employers to Comply with Title VII, Thereby Undermining the "Legitimate Interest Government Has in Ensuring [That] All People Have Equal Opportunity Regardless of Their Race."[20]

Petitioners' stringent interpretation of Equal Protection doctrine has the potential to severely impede the responsible implementation of Title VII's mandate. The disparate impact provisions of Title VII prohibit employment practices that have a

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[20] *Parents Involved*, 551 U.S. at ___, 127 S. Ct. at. 2791 (Kennedy, J., concurring in part and concurring in the judgment).

disparate impact "because of . . . race" or on the "basis of race." 42 U.S.C. 2000e-2(a)(2), (k)(1)(A)(i). The race-conscious nature of this prohibition necessarily requires an employer to be aware of the race of individual applicants when adopting selection procedures and, in fact, to consider race if the selection procedure ultimately results in a racially disparate impact. To this end, public employers must necessarily be permitted to gather, consider, and act upon racial data in order to avoid, to the extent legally feasible, any disparate impact unjustifiably resulting from their employment practices.[21] Hampering the efforts of public

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[21] In enacting Title VII, Congress envisioned cooperative remedial and conciliatory efforts on the part of employers in ensuring equal employment opportunities for minorities and women. *The Civil Rights Act of 1990: J Hearings on H.R. 4000 Before the Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 101st Cong., 1st Sess. (1990) (statement of Rep. Gunderson), *reprinted in* 5 BERNARD D. REAMS JR. & FAYE COUTURE, THE CIVIL RIGHTS ACT OF 1991: A LEGISLATIVE HISTORY OF PUBLIC LAW 102-166, at 181 (1994). Congress expressly noted that "emphasis is laid on remedial state action or voluntary action before the forces of the federal government are called into play." 88 CONG. REC. 14,219 (1964). The legislature envisioned a measure of participation from state actors both formal and informal to "combat the dark shadow cast by discrimination." *The Civil Rights Act of 1990: J. Hearings on H.R. 4000 Before the Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the H. Comm. of the Judiciary*, 101st Cong., 1st Sess. (1990) (statement of Rep. Edwards), *reprinted in* 4 BERNARD D. REAMS JR. & FAYE COUTURE, THE CIVIL RIGHTS ACT OF 1991: A LEGISLATIVE HISTORY OF PUBLIC LAW 102-166, at 19 (1994). A reading of Title VII that would require the certification of civil service examinations despite an apparent adverse impact is contrary to this purpose. *See also Faragher v. City of Boca*

employers in this regard will undercut Title VII's core objective of creating a more racially inclusive workforce.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be affirmed.

Respectfully Submitted,

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MARCH 2009

Raton, 524 U.S. 775, 806 (1998); *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986) ("We have on numerous occasions recognized that Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII.").